



EMPLOYMENT CONTRACT LAW UPDATES : DEFENDING AGAINST BREACH OF CONTRACT CLAIMS

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(A) THE TERMS OF AN EMPLOYMENT CONTRACT may consist of the following :-

- **EXPRESS TERMS** (i.e terms which are stated /written / contained in the contract);
- **IMPLIED TERMS** (i.e terms implied by case-law as being necessary to give business/commercial effect to the contract);
- **STATUTORILY IMPOSED TERMS** (i.e terms imposed by statute as forming part of the contract, even if not referred/included therein)

BRITISH BROADCASTING CORP v. HEAM [1978] 1 All ER 116, per Lord Denning :-

*"The terms and conditions of employment may include not only the contractual terms and conditions but those terms and conditions which are understood and applied by the parties in **practice**, or **habitually**, or **by common consent**, without ever being incorporated into the contract."*



Where the employee falls under the **Employment Act 1955 (EA)** :

s.7. More favorable conditions of service under EA to prevail

Subject to s.7A, any term or condition of a contract of service or of an agreement...which provides a term or condition of service which is less favorable to an employee than a term or condition of service prescribed by this Act or any regulations, order or other subsidiary legislation whatsoever made thereunder **shall be VOID** and of no effect to that extent and the more favorable provisions of this Act...shall be substituted therefor.

s.7A. Validity of any term or condition more favorable

Subject to any express prohibition under this Act..., nothing in section 7 shall be construed as preventing an employer and an employee from agreeing to any term or condition of service under which an employee is employed, or shall render invalid any term of condition of service stipulated in any CA or in any award of the IC, **which is more favorable to the employee** than the provisions of this Act...

s.7B. Removal of doubt on matters not provided for in EA

For the removal of doubt it is hereby declared that if no provision is made in respect of any matter under this Act..., it shall not be construed as preventing such matter from being provided for in a contract of service, or from being negotiated between an employer and an employee.



Where a **Collective Agreement (CA)** exist, the effect is provided by IRA 1967:

s.17. Effect of collective agreement

(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on -

(a) the parties to the agreement including in any case where a party is a trade union or employers, all members of the trade union to whom the agreement relates and their **successors, assignees or transferees**; and

(b) All workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

(2) As from such date and for such period as may be specified in the collective agreement **it shall be an implied term of the contract** between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court.



(B) EMPLOYEE'S RECOURSE FOR (ALLEGED) BREACH OF CONTRACT :-

➤ **COMPLAINT UNDER EA 1955** (procedure as set out in s.70) in 2 instances:-

s.69(1) complaint : for breach of any term of the contract of service/ provisions of EA / provisions of Wages Council Act 1947

(NB: Employee must fall within EA 1955, s.2(1) and Schedule 1)

s.69B complaint : for breach of any term of the contract of service (where wages exceed RM1,500 but does not exceed RM5,000)

(NB 1: only Parts XV and XVI applies

2: s.69C on claims for indemnity after amendment w.e.f 5.10.2000)

➤ **CIVIL ACTION** (for damages, compensation for breach of contract)

➤ **UNDER IRA 1967**

representation under **s.20(1)** (constructive dismissal)
where union involved:-

- 'trade dispute' reference under **s.26(1)** or **(2)**;
- non-compliance complaint under **s.56**;



(C) MATERIAL CONSIDERATIONS IN DEFENDING SUCH CLAIMS

(I) COMPLAINT UNDER EA 1955

- The legislative purpose of the EA is clear. The Court of Appeal in **NEOH CHOO EE & CO SDN BHD V. VASALAMANY GOVINDASAMY** [2004] 3 CLJ 321, left little doubt of this:-
"The Act, like the Industrial Relations Act 1967, is a piece of beneficial social legislation by which Parliament intends the prevention and peaceful and speedy resolution of disputes between employers and their workmen. In other words the object is to promote industrial harmony. The Act is therefore legislation which ex necessitae rei must receive a liberal interpretation."
- It is only an **inquiry**, not a court proceeding :
AUSTRAL AMALGAMATED TIN v. ABD WAHAB KOPON [2004] 2 CLJ 316
- The '**threshold jurisdiction**' of the DG Labour;
- whether an 'employee'?
LEE FATT SENG v. HARPER GILFILLAN [1988] 1 CLJ 270
COLGATE PALMOLIVE v. CHOENG FOO WENG [2002] 2 AMR 2107



- The **limitations** on the DG Labour's statutory powers ;
 - can only order payment of "*such sum of money as he deems just without limitation of the amount*" : s.69(1)
 - blanket prohibition under s.69A where there is an IR dispute;
 - limited remedy under s.69(3) where dismissal under s.14(1) set aside;
- Inquiry before the DG Labour must nonetheless be cautiously handled;
CENTRAL HLDGS v. MUHAMAD ZAILANI [2006] 6 CLJ 197
- **Execution** of DG Labour's Orders;
 - enforce as a judgment of the Sessions or Magistrates Court : s.75
 - prohibitory order may be issued against 3rd party : s.73 (NB: distinction from a regular 'garnishee' order)
- **Reference** under s.76(1) or **appeal** under s.77 (and O55r13RHC) to the High Court. Issues pertaining to stay of execution.



(II) CIVIL ACTION

- Issue relating to **jurisdiction** of the Court;
- territorial jurisdiction and s.23 CJA 1964.
- Issues relating to **limitation** of cause of action and **proper parties**;
- What is the remedy(ies) being sought :
FUNG KEONG RUBBER v. LEE ENG KIAT [1981] 1 MLJ 238
MOHD AHMAD v. YDP MAJLIS DAERAH JEMPOL [1997] 3 CLJ 135
NIK OMAR B. NIK MAN v. BSN [2005] 6 MLJ 616
- Whether to strike out or apply to confine the remedies/exposure ;
- The issue pertaining to **duplicity of proceedings** : issues to be taken at the outset;
- The issue of the measure of damages :
- **Appeal** to the Court of Appeal and stay of execution.



(III) UNDER IRA 1967

- Whether representation made within ambit of IRA 1967;
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685
CHONG KIM SANG v. METATRADE SDN BHD [2004] 2 CLJ 439: AC
- Industrial Court has no extra-territorial jurisdiction :-
KATHIRAVELU GANESAN v. KOJASA HLDGS BHD [1997] 2 MLJ 685
MUSCATINE HLDGS v. CHUAH CHYE HIN [2005] 2 ILR 78 : IC
- What is the ambit of the Minister's reference under s.20(3);
TODAY'S PLASTIC INDUSTRIES v. KALAISELVAN [2005] 2 ILR 365: IC
MALAYAN BANKING BHD v. MOHD BAHARI [2003] 3 CLJ 651: AC
- Special considerations for constructive dismissal;
SOUTHERN BANK BHD v. NG KENG LIAN [2002] 5 MLJ 553: HC

END

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